



Final Regulation Agency Background Document

Agency name	Virginia Department of Health
Virginia Administrative Code (VAC) citation	12 VAC5-612
Regulation title	Regulations for the Onsite Sewage Indemnification Fund
Action title	Implement Title 32.1-164.1:01 of the Code of Virginia, the Onsite Sewage Indemnification Fund.
Date this document prepared	October 23, 2009

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The Virginia Department of Health administers the onsite sewage indemnification fund ("Fund"), which assists any Virginia real property owner holding a valid septic tank or other onsite sewage system permit when the system fails within three years of its construction from negligence by the Virginia Department of Health. The new regulations provide notice of the Fund, establish the procedures for applying to the Fund, and establish the procedures for investigating and processing requests for assistance.

During the 60-day comment period, one person commented on the regulations and the Virginia Department of Health did not identify a need to change the regulations.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The Board of Health met on October 23, 2009 and adopted final regulations to implement the Fund. More information about the Board of Health can be found at <http://www.vdh.state.va.us/Administration/BOH/>.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Title 32.1-164.1:01 of the *Code of Virginia* gives the Board of Health authority to adopt regulations and administer Virginia's onsite indemnification fund program. The Code states that "the Board may promulgate regulations pursuant to the Administrative Process Act (§ 2.2-4000 et seq.) for the administration of the Fund consistent with this chapter." The authority to promulgate regulations is discretionary.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

Owners should have access to the rules, investigation process, and legal basis for decision-making before claims are filed to the Fund. With the statutory guidelines and the new regulations, the Commissioner can implement a fair, consistent, and predictable procedure for owners who seek assistance. Regulations will ensure that binding legal requirements are in place to administer the Fund.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

Title 32.1-164.1:01 of the *Code of Virginia* creates the Onsite Sewage Indemnification Fund to assist Virginia real property owners whose onsite sewage systems fail within three years of construction from the negligence of the health department. In order to receive assistance from the Fund, the Commissioner must find that the real property owner meets the statutory requirements (e.g., valid permit, failure three years from installation, and negligent actions by the health department caused failure); files a complete application within one year of the date of failure; follows the requirements to repair or replace the failed system; and executes a release of claims against the Commonwealth related to the failed system.

On July 26, 2007, Dr. Robert Stroube, M.D., MPH, State Health Commissioner adopted Guidance Memorandum, and Policy #123.A (GMP #123.A) to explain how VDH would accept, process, and decide requests for indemnification under Title 32.1-164.1:01 of the Code of Virginia. The policy can be viewed at: <http://www.vdh.state.va.us/onsite/GMPs/GMP123.A.pdf>. The policy provides notice of the Fund, establishes the application procedure for Virginia real property owners to apply for assistance from the

Fund, and establishes the procedure for investigating and processing requests for assistance from the Fund. The regulations codify the substance of GMP #123.A by specifying what information must be included and which actions the owner must take to file a complete application. The regulations establish the conditions under which a review might occur when a financial hardship exists. The regulations include guidelines for appealing a decision and how final administrative actions are done.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If there are no disadvantages to the public or the Commonwealth, please indicate.

The State Health Commissioner has administered the Fund since its creation in 1994 by policy (Acts of Assembly Chapter 747 (2004)). In that time, over 200 claims for indemnification have been processed. Policies do not have the same binding legal authority as laws or regulations. Real property owners have in some cases endured a long, unpredictable review process. Cases with similar facts have had different outcomes depending on the trier of fact's willingness to adhere to a policy that did not carry the force of law or regulation.

The primary advantage to the public and the agency is a more streamlined review process. The regulations set clear expectations for filing a complete application to the Fund. Owners and the agency have a known procedure for evaluation. Similar facts should result in similar results because there will be a predictable process with a predictable evaluation. Owners can expect all final administrative actions to include required information, which should allow for clear and consistent decisions.

No disadvantage is foreseen because expectations, analysis, and final administrative decisions will be outlined by the regulations.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

No changes made.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment	Agency response
Peter Brooks/PMBA, Inc.	Move 12 VAC5-612-40.B.7 and 12 VAC5-612-40.B.8 to 12 VAC5-612.40.C.	12 VAC5-612-40 describes the necessary components of a complete application. The commenter did not identify why this language

		would be better placed in paragraph C instead of paragraph B under Section 40. The agency could not identify any added value of moving 12 VAC5-612-40.B.7 and 12 VAC5-612-40.B.8 to 12 VAC5-612.40.C.
Peter Brooks/PMBA, Inc.	Twelve months is not enough time for owners to complete the requirements of 12 VAC5-612-40.B.7 and 12 VAC5-612-40.B.8.	The <i>Code of Virginia</i> (Title 32.1-164.1:01) establishes the time allowed to complete an application (one year) so the agency has no discretion in changing the timeframe. The Fund is a reimbursement program so the agency must know what costs have been incurred to reimburse owners.
Peter Brooks/PMBA, Inc.	Delete 12 VAC5-612-90.C	<p>This section describes what must be included in the Sewage Handling and Disposal Appeal Review Board’s final administrative decision. The commenter noted that the agency’s verbatim record is sufficient. The agency believes that owners will be better served when certain pertinent and necessary information is included in the final administrative decision. Owners will have a complete administrative decision that will not require them to review perhaps hundreds of pages of a verbatim record. This section ensures that owners can fully understand the basis of the final administrative decision.</p> <p>Deleting Section 90.C would be inconsistent with the statutory requirements of Title 2.2-4020(E), which specifies what must be included in a case decision from a formal hearing. Findings and conclusions are required and essential for judicial review.</p>
Peter Brooks/PMBA, Inc.	Delete 12 VAC5-612-90.D	This section provides the Sewage Handling and Disposal Appeal Review Board with an optional opportunity to hear argument and fact after a written case decision is made. The commenter suggested this optional review was unnecessary because either party can appeal final administrative decisions to circuit court. The agency disagrees: only the appellant can appeal final administrative decisions to circuit court. This regulation provides the Appeal Review Board with an optional and additional opportunity to resolve cases in accordance with applicable law and regulation. The agency cannot identify harm by allowing an optional review to ensure final administrative decisions are accurate and correct.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

No changes are being proposed.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The State Health Commissioner has administered the Fund since its creation in 1994 by policy. As noted above, policies do not have the same binding legal authority as laws or regulations and real property owners have in some cases endured a long, unpredictable review process. Cases with similar facts have had different outcomes.

Continuing to use a policy to implement the Fund would most likely result in long processes and unpredictable results for owners seeking assistance. The VDH believes regulations are the best way to ensure consistent and fair administration of the Fund.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulatory action will have no anticipated or associated impacts on family rights to educate and supervise children. It will not discourage economic self-sufficiency and family responsibilities and commitments or decrease disposable family income.